

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: : 04-16410
: :
KOLLEL MATEH EFRAIM, LLC : One Bowling Green
: New York, New York
: :
Debtor. : July 20, 2005
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TRANSCRIPT OF HEARING RE MOTION TO DISMISS OR CONVERT FOR
ADEQUATE PROTECTION OR RELIEF FROM THE STAY
BEFORE THE HONORABLE STUART M. BERNSTEIN
CHIEF UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtor: MARK FRANKEL, ESQ
Backenroth, Frankel & Krinsky,
LLP

489 Fifth Avenue, 28th Floor
New York, New York 10017

For Helen May: GERALD ORSECK, ESQ.
Orseck Law Offices
Box 469, 1924 State Route 52
Liberty, New York 12754

For All Refrigeration and Equipment: ADAM ROSEN, ESQ.
Scarcella, Rosen and Slome
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I N D E X

Direct Cross Redirect Recross Further
Redirect

WITNESSES

Jean Barbanti 5
Jack Lefkowitz 29

Debtor's
EXHIBITS:

Marked Received

6/3/04 Letter Agreement 19
9/22/04 Letter Agreement 19

1 THE COURT: Please be seated. Kolliel Match Efraim.
2 Is the movant ready?

3 MR. FRANKEL: Yes, Your Honor.

4 THE COURT: You're not the movant.

5 MR. ORSECK: Oh.

6 THE COURT: Is the movant ready?

7 MR. ORSECK: Gerald Orseck for Helen May. We filed
8 objections.

9 THE COURT: This is a motion to dismiss or convert
10 for adequate protection or relief from the stay; right?

11 MR. ORSECK: Yes.

12 THE COURT: The debtor is ready?

13 MR. FRANKEL: Yes, Your Honor.

14 THE COURT: Okay. Call your first witness.

15 MR. ORSECK: Yes. Your Honor, are we going to
16 litigate the motion to dismiss first or --

17 THE COURT: Well, that seems to be a threshold issue
18 as opposed to what?

19 MR. ORSECK: The objection to the confirmation. I
20 think it's -- our case we would ask be deemed to be also
21 considered with respect to our objection.

22 THE COURT: We haven't gotten to the confirmation
23 hearing. As I said in chambers when I reviewed it, the
24 disclosure statement, I had a question of whether -- I thought
25 your client was impaired under the plan and entitled to vote.

1 It may be that they can modify the plan right now to cash you
2 out. Whether or not you're still impaired after they retain
3 the right to sue, I don't know.

4 Why don't we deal with the threshold question of
5 whether or not the case should be dismissed or converted on the
6 theory that it's a bad faith filing and kind of the related
7 argument that if it stays, you're entitled to adequate --
8 greater protection than apparently Judge Blackshear ordered.

9 MR. FRANKEL: Your Honor, before we hear from
10 witnesses --

11 THE COURT: Yes.

12 MR. FRANKEL: There was not an affidavit of service
13 of the motion filed and we believe that it was not served on
14 creditors.

15 MR. ROSEN: Your Honor, Adam Rosen; Scarcella, Rosen
16 and Slome --

17 THE COURT: Who do you represent?

18 MR. ROSEN: All Refrigeration and Equipment which
19 was -- it's one of the largest creditors and my client is here
20 today pursuant to a subpoena. Although we received the
21 subpoena, we did not receive a motion to dismiss according to
22 my client.

23 THE COURT: Do you have an affidavit of service?

24 MR. ORSECK: I do not, Your Honor.

25 THE COURT: Motion to dismiss has to be served on all

1 creditors and parties in interest under Rule 2002(a).

2 MR. ORSECK: There were three creditors listed. We
3 did not --

4 THE COURT: All right. Then I won't consider the
5 motion to dismiss today but I will consider your application
6 for more adequate protection.

7 MR. ORSECK: Okay.

8 THE COURT: All right.

9 MR. ORSECK: Jean Barbanti. I have a witness.

10 THE COURT: Okay.

11 MR. ORSECK: Jean Barbanti.

12 THE COURT: Take the stand. But before you sit would
13 you raise your right hand?

14 (Jean Barbanti, Movant's Witness, Sworn.)

15 THE COURT: Okay. Please be seated. Speak into the
16 microphone. State and spell your name.

17 THE WITNESS: My name is Jean Barbanti, B-A-R-B-A-N-
18 T-I.

19 DIRECT EXAMINATION

20 BY MR. ORSECK:

21 Q Where do you live?

22 A Liberty, New York.

23 Q What do you do?

24 A I'm a real estate broker and consultant.

25 Q In what area? In what geographical area?

1 A Most of Sullivan and Orange County.

2 Q How long have you been engaged in that business?

3 A About approximately 30 years.

4 Q Do you do appraisals?

5 A Yes, I do.

6 Q Would you tell the Court some of the entities that you
7 have done appraisals for?

8 A Major banks, Fleet Bank, Citibank. Just about every major
9 bank. I have a list. If you'd like I can read it.

10 Q All right. I'll hand this up to you.

11 A Thank you. I've done appraisals for North Star Bank;
12 Prudential Insurance Company; Sullivan County ARC; US Small
13 Business Administration Town of Liberty; Bank of New Jersey;
14 Ingersoll Rand Town of Bethel; Van Eton Oil Company; First
15 Federal Savings and Loan of Rochester; Jefferson Bank of
16 Pittsburgh; Land Record Resources, Floral Park, New York;
17 Lender Services, Pittsburgh; Bank of New York, Monticello;
18 Ellenville National Bank, Ellenville; National Westminster
19 Bank, Melville, New York; New York Job Development Authority,
20 New York; County of Sullivan, Monticello, New York; The Ivy
21 Guild, Greenhouses, New York and Massachusetts; the Pines Hotel
22 in Fallsburg; Estate of -- the John Lennon Estate in New York,
23 New York; Stevensville Country Club; Sullivan County Golf
24 Course and Country Club; First Capital Mortgage Corp.;

1 Grossinger Hotel and Country Club; Aaron Stallman and Sons;
2 French Woods Festivals of Performing Arts in Hancock; Grays
3 Wood Works in Granville; Granite Hotel and Country Club --

4 Q Is it much longer?

5 A Yeah, about another page.

6 Q I think that that's enough. Now, you read us a list that
7 include a wide variety of entities, banks, insurance companies
8 and resort hotels; is that correct?

9 A Right.

10 Q Now, have you testified in Court as an expert concerning
11 values of real property in Sullivan County?

12 A Yes, I have.

13 Q Have you testified concerning values of resort hotels?

14 A Yes.

15 Q Have you testified in Bankruptcy Court itself?

16 A Yes, I have.

17 Q Have you testified more than two or three or four dozen
18 times? I don't want to put words in your mouth.

19 A No, I've probably --

20 THE COURT: Why don't you just ask him how many times
21 he's testified?

22 A Probably a half a dozen times.

23 THE COURT: Why don't you just ask him how many times
24 he's testified as an expert?

1 MR. ORSECK: Yeah.

2 Q How many --

3 A Okay. I've testified as an expert about a half a dozen
4 times.

5 Q Okay. Now, at my request did you evaluate the fair rental
6 value --

7 THE COURT: Before you answer that question, is there
8 any objection to this witness's qualifications? I assume he's
9 going to testify as to the value of the property issue.

10 MR. FRANKEL: No, Your Honor.

11 THE COURT: All right. Then I'll deem him an expert
12 for the purposes of valuing the property. Go ahead.

13 Q At my request did you evaluate the fair rental value of
14 the Meadows Resort at the Fosterdale intersection Route 17B in
15 Sullivan County?

16 A Yes, I did.

17 Q Are you familiar with the property?

18 A Yes, I am.

19 Q Would you tell the Judge when you first became familiar
20 with the property and how long you --

21 A Long ago when it was still owned by Forkman [Ph.] Circle
22 and then it was purchased by -- I believe Mr. Griffins
23 purchased it after that. I know of the property. I've been on
24 the property. I have seen the property.

1 Q About how many hotel rooms does it -- well no, instead of
2 that, why don't you tell us what it consists of and --

3 A All right. It comprises of approximately 60 acres. It
4 has 104 rooms, hotel rooms, and it's located at a very active
5 area called Fosterdale Four Corners. It's just beyond Four
6 Corners.

7 Q What amenities does it have or --

8 A Well, the usual amenities of a place of that nature;
9 dining facilities and commercial kitchen. Normal things for
10 what they were used for really. Similar to a hotel or motel.

11 Q Now, were you given information as to an arm's length
12 purchase price which had been arrived at within the last year
13 or so?

14 A Yes, I was.

15 Q What was that amount that you were given?

16 A \$1.4 million I believe it was.

17 Q Now, taking into consideration your knowledge of
18 properties of this type of the arm's length fair market value
19 established by an accurate sale, do you have an opinion as to
20 the rental value, the fair rental value of that property as of
21 this time or within the last year?

22 A Yes, I do.

23 Q What is that amount?

24 A Well, it was \$1.4 million for the sale and anybody that

1 would purchase at an arm's length deal or the deals that I've
2 been in would look to get at least a 10% return on their money
3 which if you were going to rent the rooms you would be looking
4 at about \$140,000.00 of income.

5 Q All right. Now --

6 THE COURT: Is that on an annual basis?

7 THE WITNESS: On an annual basis.

8 Q Okay. What about taxes, insurance, et cetera?

9 A That would be a profit after taxes and everything were
10 paid.

11 Q You mean for the landlord?

12 A Yes.

13 MR. ORSECK: I have no further questions. Oh, one
14 more.

15 Q Does that jibe, the 140, economically with 100 rooms?

16 A Yes, it would.

17 MR. ORSECK: Okay.

18 THE COURT: Cross examination?

19 MR. FRANKEL: No, Your Honor.

20 THE COURT: You can step down. Thank you. Call your
21 next witness.

22 MR. ORSECK: That concludes only with respect to
23 adequate security.

24 THE COURT: Are you also seeking relief from the

1 stay?

2 MR. ORSECK: Yes, we are.

3 THE COURT: All right. Do you have any additional
4 evidence on that issue?

5 MR. ORSECK: On relief from the stay? Yes. They're
6 by way of legal arguments.

7 THE COURT: Okay, legal argument. Do you have any
8 other evidence though?

9 MR. ORSECK: On relief from the stay? No, sir.

10 THE COURT: Okay. Do you have any witnesses?

11 MR. FRANKEL: No, Your Honor.

12 THE COURT: All right. You said that the return was
13 140 net of taxes. Who's paying the taxes under Judge
14 Blackshear's order now?

15 MR. ORSECK: It's silent. It's just \$5,000.00. I
16 was not present nor have I seen a transcript nor has anybody
17 represented to me what the transcript shows but --

18 THE COURT: Well, you're asking me though, you're
19 asking me to fix in a monthly payment, are you saying that it's
20 140 divided by 12?

21 MR. ORSECK: Plus whatever the real estate taxes --

22 THE COURT: Well, I don't have any evidence of that
23 and there's no testimony that that's something that a tenant
24 would normally pay.

1 MR. ORSECK: He -- I think --

2 THE COURT: Okay.

3 MR. ORSECK: -- Mr. Barbanti said it would be net.

4 THE COURT: All right.

5 MR. ORSECK: We have the documentation on what the
6 taxes are in the record before you, in the written record.

7 THE COURT: Okay.

8 MR. FRANKEL: Your Honor, I know that the witness
9 testified that this is what an owner would expect to obtain but
10 I don't know that there's any testimony about comparable
11 rentals and what the market would bear in that area. We've
12 heard a lot lately about how rentals at least in this area are
13 not in the same -- are not in a direct proportion to carrying
14 costs and interest.

15 THE COURT: I haven't heard any testimony other than
16 this witness who has testified that based on his experience
17 that the reasonable return would be 10%. That's the only
18 testimony I have and the only evidence I have.

19 MR. FRANKEL: Could I have five minutes, Judge?

20 THE COURT: You want to reopen the record?

21 MR. FRANKEL: No. We'll just move forward.

22 THE COURT: All right. Well, it seems to me I have
23 credible testimony that in substance the reasonable monthly
24 value to the debtor, however it chooses to use the property, is

1 140 divided by 12 plus whatever the taxes are because Mr.
2 Barbanti did state that the owner would expect to receive the
3 140 net of taxes from which I infer that the tenant would
4 either be expected to pay the taxes or the rent would be
5 increased to cover the taxes. As adequate protection payments
6 on a going forward basis I'm going to direct the debtor, and I
7 don't know what the numbers are, you can figure out the math,
8 to pay the \$140,000.00 divided by 12 plus the taxes as they
9 come due since the debtor, you didn't say it, but the debtor
10 has 100% of the premises I take it. There's no question about
11 that.

12 MR. FRANKEL: Your Honor, is that prospective or --

13 THE COURT: I said on a going forward basis. We'll
14 make it effective July 1st since he made the motion before July
15 1st and he's entitled to adequate protection at that point.

16 MR. FRANKEL: Okay.

17 THE COURT: All right. So you can settle an order to
18 that effect.

19 MR. ORSECK: Yes, sir.

20 THE COURT: Now, what do you want to do about this
21 motion to dismiss? You have to give notice to the creditors.

22 MR. ORSECK: Your Honor, on the motion to dismiss I'm
23 quite comfortable in representing to the Court that testimony
24 we elicit on the objections is indistinguishable --

1 THE COURT: The objections to the confirmation of the
2 plan?

3 MR. ORSECK: Yeah, and the disclosure statement.
4 However --

5 THE COURT: So, do you want to just go forward with
6 the confirmation hearing? I'll deem the plan to be amended. I
7 guess we should deal with the disclosure statement issue first
8 but based on our discussions in chambers I raise the issue that
9 I thought your client was impaired under the plan because the
10 debtor was not paying the money to your client. The debtor was
11 going to hold it in escrow and that altered your client's
12 contractual rights. As I understand it, the debtor then made
13 the proposal well we'll just cash him out and we'll reserve our
14 rights, whatever they are, to sue to recover for fraud or
15 whatever other theories they may have.

16 I guess the initial question is are you still
17 impaired?

18 MR. ORSECK: The answer, it's our position that we
19 are still impaired.

20 THE COURT: Why?

21 MR. ORSECK: Well, the real estate contract is --
22 we're not an unsecured creditor. The real estate contract
23 provides for \$1,500.00 a day after the scheduled closing date
24 in the event that there is no closing.

1 THE COURT: Right. Okay. So what are you owed with
2 that \$1,500.00 a day?

3 MR. ORSECK: Well, the debtor was paid up as of
4 September 27. Let's go October 1st.

5 THE COURT: So you're owed almost ten months?

6 MR. ORSECK: Yes, yes. That's when they stopped
7 payment on the check.

8 THE COURT: So, do you know how much that is?

9 MR. ORSECK: Well, \$1,500.00 would be -- it's a lot
10 of money.

11 THE COURT: I know. But you're saying that's what
12 they have to pay you I guess to un-impair you and I'm just
13 asking you what it is because --

14 MR. ORSECK: Yeah, it would be \$45,000.00 a month for
15 however many months it is. I use my fingers.

16 THE COURT: Well, it's about ten months.

17 MR. ORSECK: November, December, January, February,
18 March, April, May, June, July times nine which would be roughly
19 \$400,000.00; is it not?

20 THE COURT: What's the debtor's position?

21 MR. FRANKEL: The debtor's position is that that
22 provision was a provision that was intended to apply to a
23 failure to close and a penalty until the debtor vacated. If
24 there is a closing, the debtor's position is that that

1 \$1,500.00 a day does not apply. It was for the event of a
2 failure to close altogether and requirement that the debtor
3 vacate the premises.

4 THE COURT: Wait a minute. You mean if you fail to
5 close altogether you just have to continue to pay \$1,500.00 a
6 day forever?

7 MR. FRANKEL: Yes, until we left.

8 THE COURT: Is there a document that embodies this
9 agreement?

10 MR. FRANKEL: There's a document that embodies
11 \$1,500.00 a day. The understanding of the parties as to what
12 that means is something that will have to be elicited through
13 testimony because the document is unclear on that.

14 THE COURT: Isn't this something that has to be
15 disclosed? I realize this is a case where it may be nobody
16 votes but, you know, and we can tailor the disclosure statement
17 to that but don't you still have to have an approved disclosure
18 statement? Anybody can still object to the plan even on
19 feasibility or other grounds. It seems to me that if you do
20 owe another \$450,000.00 -- but as they say, you're either going
21 to have to escrow that on the feasibility question because
22 you're cashing everybody out with interest on the effective
23 date --

24 MR. FRANKEL: Your Honor, that issue is being raised

1 for the first time today. The seller had obvious knowledge of
2 the contents of the contract and the unsecured creditors would
3 be paid 100 cents on the dollar regardless of this obligation.

4 So, I don't think that it would be necessary for disclosure
5 purposes.

6 THE COURT: But it still -- well, all right. See, in
7 a case like this where there is not going to be voting -- well,
8 let me take that back. They're still impaired because
9 they're -- aren't they? They're alleging they're entitled to
10 additional sums than you're prepared to pay under the plan.
11 But let's get past that and let's assume that we deem you to
12 have voted as a class against the plan. So now you have to
13 cram it down. How do you do that?

14 MR. FRANKEL: Well, I can't. I don't have another
15 impaired class.

16 THE COURT: I thought you had another voting class.
17 Don't you have an unsecured class?

18 MR. FRANKEL: Yes. They're being paid in full plus
19 interest.

20 THE COURT: Okay. So how do you deal with that now?
21 You say they're not being impaired, they say they are being
22 impaired. It seems like there's -- and that's a threshold
23 issue because we now know you can't confirm the plan if they
24 are being impaired and I deem them to vote against the plan.

1 MR. FRANKEL: In that event we would need a decision
2 as to whether or not that \$1,500.00 a day is a true obligation
3 that is due.

4 THE COURT: How do I make that decision? I don't
5 have any evidence.

6 MR. FRANKEL: We'll put on a witness.

7 THE COURT: All right. Well, there are other
8 elements of confirmation. Are you suggesting that we separate
9 out this issue and try it separately as to what the obligation
10 is to Mr. Orseck's client so we can determine whether or not
11 they're impaired? Since if they are impaired in one sense
12 everything falls into place. If they're not impaired, then
13 you're going to say that you're going to cash them out.

14 MR. FRANKEL: That makes sense.

15 THE COURT: Does that make sense to you?

16 MR. ORSECK: It does.

17 THE COURT: All right. So let's try that issue, what
18 the amount of the obligation is to Mr. Orseck's client and
19 we'll fix that debt so we'll know. Are you prepared to go
20 forward on that now?

21 MR. FRANKEL: Yes.

22 THE COURT: All right. I take it it's primarily
23 documentary?

24 MR. ORSECK: Yes. I would -- let me get the

1 agreement if I may.

2 THE COURT: Maybe I ought to read the agreement
3 first. Maybe this is just a question of law that I can resolve
4 by reading the agreement.

5 MR. ORSECK: I think that it is, Judge.

6 THE COURT: Let me see. Is this in the contract of
7 sale?

8 MR. ORSECK: It's in one of the letters of --

9 THE COURT: One of the letter agreements?

10 MR. ORSECK: Yes.

11 MR. FRANKEL: I can hand up the copies that I have.

12 THE COURT: Okay.

13 MR. FRANKEL: There's two letter agreements. There's
14 a June 3, 2004 and a September 22, 2004.

15 THE COURT: What were the dates?

16 MR. FRANKEL: June 3rd and September 22nd.

17 THE COURT: All right. Why don't we mark them as
18 Debtor's Exhibits 1 and 2 so we have a record. I'll mark the
19 earlier one dated June 3, 2004 as Debtor's Exhibit 1. Any
20 objection to the receipt of the document?

21 MR. ORSECK: No, sir.

22 THE COURT: Okay. It's in evidence.

23 (Letter Agreement, Debtor's Exhibit 1, Received.)

24 THE COURT: The second document is dated -- now, you

1 gave me two --

2 MR. FRANKEL: The second document is attached to the
3 first document.

4 THE COURT: Okay. I'm going to separate them. The
5 second one which is -- the second letter which is dated
6 September 22 will be Debtor's Exhibit 2. Any objection to the
7 receipt of that document, Mr. Orseck?

8 MR. ORSECK: No, sir.

9 THE COURT: Okay. It's received.

10 (Letter Agreement, Debtor's Exhibit 2, Received.)

11 THE COURT: Now, what is it that I should be reading?
12 Let's start with you, Mr. Frankel.

13 MR. FRANKEL: Judge, the first document has in it on
14 Page 3 the last full paragraph, it starts, "In the event the
15 debtor fails to close on or before September 27th for each day
16 the [sic] continue to operate --" that's obviously a typo --
17 "the premises, they shall become liable to the seller for the
18 additional sum of \$1,500.00 until they quit the premises."
19 Now --

20 THE COURT: Are you saying that goes away if you
21 close?

22 MR. FRANKEL: Yes. Part of the reason I'm saying
23 that is if you move on to the September 22, 2004 letter which
24 extended the closing date to November 27, 2004, it was set

1 forth in there what the new obligations were for the extension
2 and there was nothing in there about the \$1,500.00 a day
3 continuing. It's our position that given the payment of rent
4 rather than the \$1,500.00 a day penalty that the \$1,500.00 a
5 day penalty was for a failure to close altogether and then the
6 need for the debtor to vacate as provided in the initial June
7 3, 2004 letter.

8 MR. ORSECK: Let me know when you're finished.

9 THE COURT: I'm sorry, how did the second letter,
10 Debtor's Exhibit 2, change the deal? Under the first -- as I
11 read -- let me step back. As I read the June 3 letter it says
12 that you got to pay \$1,500.00 a day for every day you're in
13 possession that you haven't closed. Isn't that what it says?

14 MR. ORSECK: Or until they vacate the premises.

15 THE COURT: Or vacate the premises.

16 MR. ORSECK: Yeah. It's not open-ended.

17 MR. FRANKEL: Your Honor, I did not see the \$1,500.00
18 a day until you close. It's \$1,500.00 a day until you vacate.

19 THE COURT: Okay. So you owe them \$1,500.00 a day.
20 You're in possession; right?

21 MR. FRANKEL: That's one plausible reading I suppose
22 of the June 3rd.

23 THE COURT: What's the other reading?

24 MR. FRANKEL: But when you combine it --

1 THE COURT: Okay. Let me just stop there. This is
2 the first letter.

3 MR. FRANKEL: The way we read this is different than
4 that. I understand the way the Court reads it.

5 THE COURT: How do you read it?

6 MR. FRANKEL: The way we read it is that there was
7 rental payments that were set forth in here that had to be paid
8 up to closing and then if we didn't close then we had to -- we
9 would no longer have a right to pay rent, we would have to
10 vacate. At that point it became a penalty of \$1,500.00 a day.

11 THE COURT: When did the penalty kick in though?

12 MR. FRANKEL: It kicked in on the closing date,
13 September 27, 2004.

14 THE COURT: Okay. All right. So, after September
15 27th for every day you were in possession and there was no
16 closing you had to pay \$1,500.00 a day; isn't that what this
17 means?

18 MR. FRANKEL: No. You're adding to it "and there is
19 no closing," and I don't think that that's --

20 THE COURT: Well, if there's a closing you don't owe
21 them anything anymore. Isn't the whole concept of this that as
22 long as you're in possession under this interim lease
23 arrangement after September 27th which was the initial closing
24 date, you've got to pay a penalty of \$1,500.00 a day?

1 MR. FRANKEL: That's not the way we read it. The
2 way --

3 THE COURT: Tell me how you read it.

4 MR. FRANKEL: The way we read it is that if we, on
5 September 27th, didn't close and we were never going to close,
6 then it would be a \$1,500.00 a day penalty until we vacated.

7 THE COURT: Let me read it again. Tell me again how
8 you read this.

9 MR. FRANKEL: That this is a penalty for us not
10 closing and remaining in possession as opposed to us remaining
11 in possession pending the closing.

12 THE COURT: That's not how I read this. I'll tell
13 you I don't think that's a reasonable interpretation. The
14 plain language is that if you don't close on September 27th for
15 every day you remain in possession it's a penalty, or an
16 additional sum as the letter says, of \$1,500.00 a day until you
17 get out.

18 MR. FRANKEL: Well, I think that when you read this
19 letter -- then I would ask the Court to look at the subsequent
20 letter --

21 THE COURT: Okay. All right. Fair enough.

22 MR. FRANKEL: -- and see whether that would change
23 the Court's opinion.

24 THE COURT: All right. Now, I was just focusing on

1 what that letter meant. Now, let me just read this next
2 letter.

3 [Pause in proceedings.]

4 THE COURT: Okay. Now, tell me about this letter.

5 MR. FRANKEL: Your Honor, it's the debtor's position,
6 and Mr. Lefkowitz who was involved in the negotiation can
7 testify that --

8 THE COURT: Well, unless it's ambiguous I don't need
9 testimony. Tell me what you think it means.

10 MR. FRANKEL: What this letter did was modify the
11 prior letter setting forth the debtor's obligations subsequent
12 to the September 27th date until closing and it did not have
13 the \$1,500.00 a day as being an additional charge.

14 THE COURT: Well, the next to the last paragraph says
15 "All other provisions of that letter agreement," meaning the
16 June 3rd agreement, "shall remain in full force and effect
17 except as modified above." What do you think that means?

18 MR. FRANKEL: I think what that means is that
19 generally the other obligations to pay the amounts due, meaning
20 the mortgage, the insurance, remain in effect but that the
21 \$1,500.00 a day which was a penalty, since it's not included in
22 here and it would have been because it would have dwarfed any
23 other expense, that that shows that the \$1,500.00 a day was
24 intended to be in the event of a breach and failure to vacate

1 post closing. I believe that there's ambiguity on that issue
2 at least and Mr. Lefkowitz would testify that that was the
3 intent of the parties.

4 THE COURT: Mr. Orseck?

5 MR. ORSECK: I don't think testimony as to the intent
6 of an unambiguous agreement is appropriate. I think that the
7 Court may draw the inference that the modification -- not the
8 modification, the further extension, the purpose of it was to
9 put down further -- additional considerations for a further
10 extension and it's just like the contract which is at issue in
11 the summary judgment motion. The business people made a mature
12 judgment to sign an agreement which says that all of the terms
13 of the June 3 agreement shall remain in full force and effect.
14 There would have to be a specific modification and there just
15 isn't any and there wasn't intended to be any.

16 THE COURT: Well, do you think that this agreement
17 also postponed the \$1,500.00 a day penalty to the adjourned
18 closing date of November 29th? In other words, this agreement
19 was entered into before the first scheduled, or I guess the
20 second scheduled closing date of September 27th.

21 MR. ORSECK: That's correct. That's correct.

22 THE COURT: It extends the closing date to November
23 29th.

24 MR. ORSECK: No, that's the second agreement which

1 they gave us the bad check for.

2 THE COURT: That's a different question.

3 MR. ORSECK: I'm sorry.

4 THE COURT: I mean, you know, there are a lot of
5 questions I think about this second letter whether it's simply
6 an offer of accord in which case you can sue under the original
7 agreement, or whether it's a novation in which case you can
8 only sue under this agreement, or it didn't change the first
9 agreement and just supplemented it as set forth. For those
10 reasons I do think it's somewhat ambiguous.

11 At a minimum it's ambiguous of whether the \$1,500.00
12 a day penalty which was contained in the first letter and
13 contemplated a September 27th closing with a penalty every day
14 after that was in essence now not going to kick in until the
15 new closing date of November 29. It just doesn't seem
16 reasonable to say that the debtor had to pay \$1,500.00 a day in
17 addition to these other obligations to extend the closing when
18 the closing had been extended. So, that's certainly a question
19 I have under this agreement, let me finish, which is material
20 to the issue we're talking about, whether or not it changes the
21 underlying obligation to pay \$1,500.00 a day even if it kicks
22 in after November 29th as opposed to after September 27th.

23 So, I will hear testimony. I do think the agreement
24 is ambiguous and I will hear testimony on what the parties

1 discussed. Obviously, secret understandings or undisclosed
2 meanings don't bear on -- or undisclosed intentions don't bear
3 on what the parties intended because I have to know where their
4 minds met.

5 So frankly, you can call your witness who can give
6 evidence relating to what the parties intended.

7 MR. ORSECK: Your Honor, before we do that, before we
8 do that, I would respectfully call the Court's attention to the
9 third page from the last on the second agreement.

10 THE COURT: Third? It's only a two-page agreement.

11 MR. ORSECK: Yeah. My pages aren't numbered.

12 THE COURT: No, but the whole second agreement is
13 only two pages. How can it be the third page from the last?
14 You're talking about the --

15 MR. ORSECK: I'm sorry.

16 THE COURT: You're talking about the September 22nd
17 letter?

18 MR. ORSECK: Yes. Judge, at the end of the second
19 agreement, the September agreement, it says, "This letter of
20 agreement shall be without prejudice to any and all rights of
21 our client --" and we're the ones who wrote the letter -- "with
22 respect to the purchaser's failure to comply with in terms of
23 the letter agreement dated June 3 and shall not be construed as
24 a waiver of any part."

1 THE COURT: Right.

2 MR. ORSECK: I think that that's pretty clear and the
3 intent, what the parties intended is really not what this is
4 about. It's what they agreed to in writing.

5 THE COURT: All right. What you're arguing is the
6 agreement is unambiguous. Let me just respond because I think
7 we're just arguing with each other at this point.

8 MR. ORSECK: Yeah, which I don't want, yeah.

9 THE COURT: First, the obligation to pay the
10 \$1,500.00 a month [sic] had not even kicked in by the time --
11 this was June 3rd -- by the time the September 22nd letter had
12 been written. That obligation wouldn't kick in until
13 theoretically I guess September 28th. Under the original
14 letter this closing was scheduled for September 27th. If the
15 debtor didn't close by that day then there would be this
16 additional obligation.

17 Also your argument suggests that nothing was changed,
18 no rights were changed from the first letter but yet the
19 preceding paragraph implicitly recognizes that there are some
20 modifications to the first letter.

21 MR. ORSECK: But they're all intended to be in our
22 favor. They're additional --

23 THE COURT: Well, but you see now you're arguing that
24 I should construe the ambiguity in your favor.

1 MR. ORSECK: Well, if there is ambiguity, I have no
2 right to ask you to construe an ambiguity.

3 THE COURT: Well, I'll --

4 MR. ORSECK: It's our position that it's not --

5 THE COURT: I've already ruled it's ambiguous and
6 you've convinced me now that it's even more ambiguous than I
7 thought it was in the first place. So I will hear testimony
8 relating to the intention of the parties.

9 MR. ORSECK: All right. Just prior to that, Judge,
10 we also make the legal argument that by stopping payment on the
11 check that this second agreement doesn't even kick in.

12 THE COURT: What if it was a novation? What if it
13 was a novation rather than an accord and satisfaction?

14 MR. ORSECK: Well, it still has to be paid for.

15 THE COURT: So you have a claim for the \$30,000.00.
16 You may -- I mean it's part of -- well, fair enough. You may--
17 it seems to me that they owe you more than \$1.4 million.
18 Whether it's the additional \$450,000.00 you claim or the
19 \$30,000.00 stop payment or some other sum is what this hearing
20 is really about. They owe you some money. The question is how
21 much beyond the \$1.4 million or 1.4 less the I guess the
22 deposit.

23 MR. ORSECK: May I confer with counsel for one
24 second?

1 THE COURT: Sure.

2 [Pause in proceedings.]

3 THE COURT: What's going on, gentlemen?

4 MR. ORSECK: I'm sorry.

5 MR. FRANKEL: It was a brief, unsuccessful attempt to
6 avoid testimony.

7 THE COURT: Okay.

8 MR. ORSECK: It gets right back to what we were
9 talking about before.

10 THE COURT: Okay. Go ahead.

11 MR. FRANKEL: Mr. Jack Lefkowitz.

12 THE COURT: Mr. Lefkowitz, would you raise your right
13 hand?

14 (Jack Lefkowitz, Debtor's Witness, Sworn.)

15 THE COURT: Okay. Would you state your name and
16 spell it for the reporter and speak into the microphone,
17 please?

18 THE WITNESS: Jack Lefkowitz, L-E-F-K-O-W-I-T-Z.

19 DIRECT EXAMINATION

20 BY MR. FRANKEL:

21 Q Mr. Lefkowitz, could you please state your position with
22 the debtor?

23 A Managing member.

24 Q I'd like to show you documents that have been marked as

1 Debtor's 1 and Debtor's 2 in evidence. I ask if you could
2 review them.

3 A Yes, sir.

4 Q Could you tell us what these documents are?

5 A These were basically an extension on occupancy agreements.

6 Q Were you involved in the -- did you sign these documents?

7 A Yes, I did.

8 Q Were you involved in the negotiation of these documents?

9 A Yes.

10 Q Could you tell me what the agreement was between the
11 parties as embodied in the documents with respect to the
12 \$1,500.00 a day provision?

13 MR. ORSECK: Oh, with respect to the \$1,500.00? I
14 object on the grounds that notwithstanding the Court's ruling
15 we believe to be unambiguous.

16 THE COURT: Oh, well you don't have to keep making
17 that objection. If that's your objection, it's overruled.

18 A We basically had a use and occupancy agreement with the
19 sellers that we can occupy it for the months of July and August
20 of last year and we had agreed to a rental payment and
21 operating expense numbers and based on the extension where we
22 no longer were going to be paying rent because we're not going
23 to be occupying we had this \$1,500.00 a day extension penalty
24 until we close. So it's either we pay rent and all the

1 operating expenses or we pay the \$1,500.00 a day. It was never
2 intended to pay both.

3 Q Could you explain how --

4 THE COURT: What was the amount of rent that you were
5 paying?

6 THE WITNESS: It was basically we were paying a
7 rental number plus insurance plus all the utilities plus all
8 the maintenance. So every month it varied. Plus we were
9 paying some credit card bills of their sellers.

10 THE COURT: You say you had the choice after
11 September 27th to pay \$1,500.00 a day or the rent?

12 THE WITNESS: Well, in September we wouldn't be
13 paying rent anymore. We wouldn't be occupying it, so it was
14 either/or. Either occupancy or \$1,500.00.

15 THE COURT: I don't understand that. I thought the
16 agreement was that after September 27th if you hadn't closed
17 you pay \$1,500.00 a day.

18 THE WITNESS: But we're no longer in a rental. So he
19 was worried that we're not going to close, he doesn't have our
20 rental money.

21 THE COURT: Right.

22 THE WITNESS: So either we pay rent and all the
23 operating expenses or the \$1,500.00 a day. Never both.

24 THE COURT: I understand that but are you saying that

1 after September 27th you had the choice of paying the lower
2 number, either rent or \$1,500.00?

3 THE WITNESS: It's basically the same. \$1,500.00 a
4 day is equivalent to \$45,000.00 a month. This is how much the
5 operating expenses we paid during the occupancy.

6 THE COURT: Okay.

7 THE WITNESS: So it's equivalent.

8 Q Did anything change by the Debtor's Exhibit 2?

9 A No. We just kept on paying U&O and all the operating
10 expenses throughout the year.

11 MR. FRANKEL: No further questions, Your Honor.

12 THE COURT: Okay.

13 MR. ORSECK: It's difficult to cross examine because
14 I really don't understand the answer to your question.

15 THE COURT: You know, sometimes you have to know just
16 to sit down.

17 MR. ORSECK: I think it's a good idea to sit down.

18 THE COURT: Look, you're the lawyer.

19 MR. ORSECK: I know. I'm going to sit down.

20 THE COURT: Okay. You can step down. Thank you.

21 THE WITNESS: Thank you.

22 THE COURT: Any other witnesses?

23 MR. FRANKEL: No, Your Honor.

24 THE COURT: All right.

1 MR. ORSECK: We have no witnesses.

2 THE COURT: All right. Let me take these in chambers
3 and just read them again.

4 [Off the record.]

5 THE COURT: Please be seated. The limited issue
6 presented to the Court was the amount of the claim by Mr.
7 Orseck's client which I'll call holdings for simplicity. I
8 reviewed the two letter agreements that were presented for me.

9 As I read the first agreement and based upon the testimony of
10 Mr. Lefkowitz, I conclude that among other things it required
11 the debtor to pay the carrying charges of the property as well
12 as the mortgage of \$9,750.00 a month, insurance of \$2,500.00 a
13 month, interest on a certain credit card debt of \$3,500.00 a
14 month. Mr. Lefkowitz testified that that came to about
15 \$45,000.00 a month.

16 The letter further divided in material part, this is
17 the first letter, that in the event that the debtor failed to
18 close on or before September 27th the debtor would have to pay
19 what I'll call a daily penalty or an additional sum of
20 \$1,500.00 per month [sic]. Now, the letter is somewhat
21 ambiguous to the extent it doesn't really say whether the
22 debtor is also required to continue to pay the carrying charges
23 in addition to the \$1,500.00 per month [sic.] But based on Mr.
24 Lefkowitz's testimony which was not refuted that it was one or

1 the other but not both and the implication that the \$1,500.00 a
2 day was selected as the sum to match the monthly carrying
3 charge I conclude at least under the first letter that if the
4 debtor didn't close by September 27th then for every day
5 thereafter that the debtor remained in possession and did not
6 vacate it was liable for another \$1,500.00 a day.

7 As I read the September 27th agreement on which there
8 was no testimony, it only modified the -- well, it modified the
9 September -- I'm sorry, the June 3rd agreement in two material
10 respects with regard to the issue we're discussing. First, it
11 eliminated the \$3,500.00 per month obligation for payment of
12 interest on the credit card which to me implies that the
13 parties contemplated that they would extend the June 3rd
14 obligations to the new closing date of November 29th. In other
15 words, that the debtor was not liable for \$1,500.00 a day but
16 that the debtor would continue to pay the operating charges
17 less the \$3,500.00 a month.

18 It also imposed obligations, two additional new
19 obligations. The first is the obligation to pay \$20,250.00 if
20 there's no closing -- or rather to pay an additional \$20,250.00
21 for the extension but if the debtor didn't close on or before
22 October 27th to pay another \$20,250.00. It seems to me that
23 those obligations are due under this agreement.

24 In addition, the September 22, 2004 agreement did not

1 otherwise refer to the post November 29th remaining in
2 occupancy but failing to close but does contain the provision
3 all other provisions of that letter agreement, meaning the June
4 3rd letter agreement, shall remain in full force and effect
5 except as modified above. I rule that to say if the debtor did
6 not close by November 29th in addition to the \$40,500.00 that
7 it had to pay in two lump sums under this payment agreement it
8 had to pay \$1,500.00 a day while it remained in possession,
9 which according to Mr. Lefkowitz or according to any math comes
10 to about \$45,000.00 a month. The question I had is why the
11 debtor doesn't continue to remain obligated to pay that. In
12 other words, that's the use and occupancy and why did we have a
13 separate hearing on use and occupancy?

14 MR. FRANKEL: Judge, we continue to pay the carrying
15 costs and we continue to pay use and occupancy as fixed by
16 Judge Blackshear.

17 THE COURT: Well, that's the question. That's what
18 I'm a little confused about and I realize you're not involved
19 in this, Mr. Orseck, but why didn't holdings come in on day one
20 and say you're still in possession, you're accepting the
21 benefits of this interim occupancy agreement because you have
22 no other right to be on the premises, so pay me \$1,500.00 a
23 day?

24 MR. FRANKEL: They did.

1 THE COURT: And what happened?

2 MR. ORSECK: They did. Judge Blackshear says it's --
3 I wasn't there and --

4 THE COURT: Is there a transcript of this hearing?

5 MR. ORSECK: -- and there was no hearing from what I
6 understand. Judge Blackshear just said 5,000, that's it.
7 That's my understanding of what happened. I wasn't there.

8 THE COURT: All right. Well look, you're only
9 pressed -- well, you're pressed for -- you got what you pressed
10 for on the adequate protection so I'm not going to revisit it.
11 But it seems to me that that's what you're obligated to pay
12 and you're probably entitled to a credit to the extent you paid
13 U&O because Mr. Lefkowitz's testimony was you didn't get both
14 so it doesn't seem while the agreements are arguably ambiguous,
15 I don't think that the holdings is entitled to both. They're
16 entitled to \$45,000.00 a month under these agreements. I think
17 that's what you have to cure.

18 MR. LEFKOWITZ: Your Honor, may I be heard?

19 THE COURT: Why don't you talk to your lawyer first?

20 [Pause in proceedings.]

21 MR. FRANKEL: Judge, I don't have a transcript from
22 the prior hearing. The seller did come in and request that the
23 \$1,500.00 be paid and Judge Blackshear asked what their costs
24 were, heard it, and ruled \$5,000.00 a month.

1 THE COURT: So you're saying that they lost that by
2 not appealing that decision, they're limited to the \$5,000.00 a
3 month?

4 MR. FRANKEL: That is the prior ruling from Judge
5 Blackshear.

6 THE COURT: Yes, sir?

7 MR. ORSECK: That can't be a final determination.
8 That was a sole adequate protection number which really just
9 permitted during the bankruptcy case the debtor to stay there.

10 THE COURT: You know, Mr. Orseck, I was going to say
11 the same thing you said. However, I will give you an
12 opportunity for you to demonstrate, which you're not going to
13 do right now, that on some theory the holdings is foreclosed
14 from getting the \$1,500.00 a day. It does sound to me -- and I
15 don't know what happened. I don't know if there's a
16 transcript. It does sound to me like that was just a
17 determination of adequate protection and I'm not sure that as a
18 matter of law an adequate protection order ever finally
19 determines what an underlying debt is because there are
20 different issues and this is fixing the amount of the claim, in
21 essence the amount that's necessary to cure if you're going to
22 assume this contract which is what we're really talking about.

23 But --

24 MR. FRANKEL: Well, or --

1 THE COURT: -- I will give you an opportunity to do
2 that but you have to continue to make the payments to them that
3 they're arguing about that I've ordered today which is
4 essentially the operating expenses that you've been paying plus
5 the 140 divided by 12.

6 MR. FRANKEL: So we would continue to pay the
7 operating expenses plus 140 divided by 12?

8 THE COURT: And I'll give you a briefing -- yes,
9 that's their adequate protection and I'll give you a briefing
10 schedule if you want to go that route, you know, to demonstrate
11 that somehow they're foreclosed from asserting that claim, that
12 it's been litigated before Judge Blackshear and they lost. It
13 doesn't sound like it from what you've told me but, you know --

14 MR. FRANKEL: To be honest with you, I don't have
15 great recall of that hearing. It happened relatively quickly.
16 But I will order the transcript and we'll see what it says.

17 THE COURT: Were any briefs put in on that?

18 MR. FRANKEL: No. There was the lift stay motion and
19 it was raised in argument and the Judge ruled summarily.

20 THE COURT: Well, I'll give you that opportunity.
21 Let's talk a little bit about putting some sense to this
22 proceeding now because I have a lot of motions before me.

23 The first issue is I think you ought to modify your
24 disclosure statement. Okay? The only thing that has been

1 resolved today is the adequate protection on a going forward
2 basis. They've raised the argument about what the cure costs
3 are. I've issued a ruling and you have the right to contend to
4 demonstrate that they're foreclosed from asserting that. You
5 know, I guess you could still confirm this case and escrow all
6 these monies and if they're right, they get them. That's a
7 decision you can make unless you're going to make it right now.

8 The second thing is, you know, as I said I have
9 motions to dismiss or convert and the sense I got from Mr.
10 Orseck is that his motion to dismiss is really an objection to
11 the plan, that it's not feasible.

12 MR. ORSECK: That's part of it but the reason for the
13 dismissal which was also an argument against confirmation is
14 bad faith before, during, after, right up to today and I think
15 that we can demonstrate that.

16 THE COURT: So, do you want to withdraw your motion
17 to dismiss since you haven't served it and just litigate it as
18 part of the confirmation hearing as an objection to the good
19 faith of the debtor? Because, you know, normally if you make a
20 motion to dismiss or convert I'd deal with that first. It's a
21 threshold motion.

22 MR. ORSECK: I appreciate that. Yes, because if I
23 had grounds for the dismissal it would certainly, at least in
24 my estimation, be grounds to prevent confirmation. I see it --

1 that's my judgment.

2 THE COURT: All right.

3 MR. ORSECK: So the answer is yes --

4 THE COURT: All right.

5 MR. ORSECK: -- we withdraw the motion to dismiss.

6 THE COURT: We're going to deem the motion to dismiss
7 and convert withdrawn and we'll treat it as opposition to the
8 confirmation. So, we've dealt with that. Why don't you just
9 write a letter confirming that? Okay?

10 MR. ORSECK: I will do that.

11 THE COURT: All right. Now, I had cut you off. Is
12 there something --

13 MR. ORSECK: Before -- am I to submit an order on
14 the --

15 THE COURT: Yes. You should submit a separate order
16 which requires from July 1st on a going forward basis -- when
17 did you make your motion?

18 MR. ORSECK: It was in June, but July 1st is fine.

19 THE COURT: All right. July 1st on a going forward
20 basis if they're obligated to continue to pay the operating
21 expenses plus I'm informed that the sum is \$11,666.67 per
22 month.

23 MR. ORSECK: Plus 1/12th of the taxes.

24 THE COURT: Whatever those expenses are.

1 MR. ORSECK: Right. Okay.

2 THE COURT: Right, 1/12th of the taxes.

3 MR. FRANKEL: Your Honor, we're prepared to go
4 forward with the rest of the confirmation hearing today and
5 escrow the entire amount.

6 THE COURT: Well, we haven't figured out what the
7 entire amount is. Are you going to be able to prove that you
8 have the entire amount now?

9 MR. FRANKEL: Yes. The \$1,500.00 a day from the
10 November 27th date plus the \$20,250.00 that's due on the
11 extension agreement plus the \$1.4 million.

12 THE COURT: Well, it's actually \$40,500.00 due on the
13 extension agreement.

14 MR. FRANKEL: No, we paid the first.

15 THE COURT: Oh, you paid the first \$20,250.00? They
16 paid that?

17 MR. ORSECK: The paid --

18 THE COURT: The first \$20,250.00?

19 MR. ORSECK: No.

20 THE COURT: I thought that's the one you stopped the
21 check on.

22 MR. ORSECK: That's not so.

23 MR. FRANKEL: Oh, I'm sorry.

24 MR. ORSECK: I disagree with the date.

1 MR. FRANKEL: Oh, just one payment.

2 MR. ORSECK: The date that they have to start paying
3 the \$1,500.00 --

4 THE COURT: No, stop. The agreement said that you
5 pay \$20,250.00 for the extension and I thought it said if you
6 don't close by October 27th you have to pay another \$20,250.00.
7 Read the last sentence of the last paragraph on the first
8 page.

9 MR. LEFKOWITZ: That was the payment that was
10 stopped, Your Honor.

11 MR. FRANKEL: Did you pay the first one?

12 MR. LEFKOWITZ: The first one was paid.

13 MR. FRANKEL: The first one --

14 THE COURT: Why would you have paid the second
15 payment at the end of September? This letter was prepared --

16 MR. FRANKEL: No, it's \$20,000.00 upon return of the
17 letter which was September 22nd. You stopped payment --

18 THE COURT: Why would you have paid -- wait, wait.
19 Why would you have paid the second payment at the end of
20 September? You had until October 27th to close.

21 MR. FRANKEL: What I'm saying is that when we signed
22 the letter --

23 THE COURT: You're saying that's the one that was
24 stopped.

1 MR. FRANKEL: No, no, that's wrong. It was the
2 second one that was stopped.

3 THE COURT: Well, then I have a factual issue. I
4 find it hard to believe that you made that second payment three
5 or four days later.

6 MR. FRANKEL: The second -- it was not three or four
7 days later. That was due monthly.

8 THE COURT: Yes, and the payment was stopped with
9 that September 27th or 28th letter. There was a \$30,000.00
10 payment.

11 MR. FRANKEL: It was \$20,250.00 and \$20,250.00. The
12 first \$20,250.00 was paid. The second \$20,250.00 was stopped.
13 Well, we'll produce checks.

14 THE COURT: All right. Well, in the meantime you'll
15 have to ask for the entire sum.

16 MR. FRANKEL: Ask for the entire sum.

17 THE COURT: I just find it hard to believe that that
18 second \$20,250.00 payment was made three days or four days
19 after you paid the first payment. You had until October 27th.
20 What if you closed by October 27th? You'd never owe it.

21 MR. FRANKEL: Judge, it's a month later.

22 MR. ORSECK: Judge, there's no point arguing. They
23 didn't give us either one. There's no point arguing about what
24 is.

1 THE COURT: He says you did get one of them.

2 MR. FRANKEL: I think that --

3 THE COURT: We'll escrow it. Just escrow. So, what
4 are you going to escrow?

5 MR. FRANKEL: We'll escrow it. It's not a philosophy
6 question. It's we'll have the check and we'll show it.

7 THE COURT: All right. So what's the total amount?
8 Let's just agree on the amount that has to be escrowed.

9 MR. FRANKEL: It will be \$40,500.00 plus \$1,500.00 a
10 day from -- less the amounts that we've paid for use and
11 occupancy and carrying costs and plus the \$1,260,000.00 on the
12 contract.

13 THE COURT: Well, I have to know how much it is for
14 feasibility purposes. Why don't we do this. I have a Judges'
15 meeting at 12:30. Let's reconvene at 2:00. See if you can
16 agree on the amounts that are going to have to be paid or
17 escrowed and then we can move on with the rest of it. Okay?
18 Maybe we'll save some time that way. See what else you can
19 agree on in terms of the other elements of 1129(a).

20 But I come back to the question -- I guess they're
21 unimpaired is what you're saying.

22 MR. FRANKEL: Yes.

23 THE COURT: Before we go, is there any dispute now
24 that you're -- I think if you're escrowing it and not paying it

1 to them, they're still impaired; aren't they? That was the
2 question I had when I read your plan and disclosure statement.

3 MR. FRANKEL: Your Honor, I think it's often the case
4 in plans where the undisputed portion is paid, the disputed
5 portion is escrowed and that makes the creditor unimpaired.
6 That happens all the time. It's a question of whether or not
7 they're getting --

8 THE COURT: That's true, it does. What's your
9 position?

10 MR. ORSECK: Well, we also take the position that --
11 the alternative position that the contract ceased to be of
12 any -- it's not enforceable by them and they can't --

13 THE COURT: Why can't they? There seems to be no
14 question that they're assignees with a contract. Why can't
15 they assume and assign it by curing all the defaults?

16 MR. ORSECK: Because there was a time of the essence
17 that went by and with due respect to the Bankruptcy Court, it's
18 a state law that applies. We can argue that they lost any
19 rights to conveyance of that property when they gave us that
20 bad check on the --

21 THE COURT: Why don't we do this? You can reserve
22 that argument. I'll take briefing on this one. But assuming
23 you -- once we fix the amount, you can put on your case, put on
24 your case. You can brief the issue of whether or not you're

1 impaired or not and entitled to both because there's been a
2 concession that if you're impaired and entitled to both they
3 don't have an accepting class and I can't confirm. That's
4 really a legal issue. I don't need evidence on that assuming
5 that one, we figured out how much you're owed and two, that
6 they demonstrated that they can escrow that and they will
7 escrow that. So it's a legal issue we can put aside.

8 I guess you could also argue that the underlying
9 agreement is not assumable as a matter of law even though the
10 bankruptcy was filed before the closing date.

11 MR. FRANKEL: Your Honor, given the Court's schedule
12 I think that we would prefer to adjourn than to come back later
13 today if that's --

14 THE COURT: Come back at 2:00.

15 MR. FRANKEL: We prefer to adjourn the hearing to
16 another date rather than --

17 THE COURT: Well, maybe we can resolve some of these
18 issues beforehand. There may not be a purpose to another
19 hearing. In other words, if the law is by simply escrowing
20 this creditor's claim and not paying it, you're impairing them
21 and if they're impaired they're entitled to vote and if they
22 don't vote in favor of the plan, which they're obviously not
23 going to do, you can't confirm. Maybe that's an issue we
24 should deal with.

1 MR. FRANKEL: There's a lot of issues that are being
2 raised and I think --

3 THE COURT: Well, yes, I know.

4 MR. FRANKEL: -- I think it makes sense to adjourn it
5 and to try to work out some of these issues before we come back
6 with an evidentiary hearing.

7 THE COURT: Let me ask you a question. This is
8 really I mean a dispute between holdings and the debtor about
9 the amount of money that's going to be paid. Does it make
10 sense to send this to mediation where both sets of clients have
11 to come in and not just the lawyers?

12 MR. FRANKEL: Yes.

13 THE COURT: Mr. Orseck? I take it as long as you're
14 getting the adequate protection payments you're not being
15 harmed by the continuation of this bankruptcy however it turns
16 out. If it's dismissed you'll still have your claim less your
17 adequate protection payments presumably. Meanwhile you're
18 getting money.

19 MR. ORSECK: Judge, I don't think there's anything to
20 mediate, with all due respect. I think it's arithmetic.

21 THE COURT: It's not arithmetic. I'm talking about
22 not just the amount of your claim but the underlying issue of
23 whether and how much the debtor is going to pay for the
24 property. That's really what the -- that's what this is all

1 about. The more I see about this you probably are owed more
2 than \$1.4 million because there are these other obligations
3 that you're entitled to receive one way or the other.

4 Before you do any briefing I'm going to appoint a
5 mediator. Issue an order appointing a mediator today in this
6 matter. You'll have seven days to see if you can agree on a
7 mediator. This person can mediate the entire plan because
8 that's really what we're talking about. If you don't agree in
9 seven days I'll ask you, Mr. Frankel, to write me a letter just
10 saying that you haven't agreed --

11 MR. FRANKEL: Okay.

12 THE COURT: -- and then I will appoint a mediator to
13 deal with this issue. All right? Because -- and one of the
14 reasons I'm doing this is we seem to be spinning a lot of
15 wheels and every time I hear something another issue comes up
16 and the case really isn't keyed up to be confirmed. I haven't
17 approved the disclosure statement. The disclosure statement
18 doesn't disclose all these issues that have come up. It may be
19 that they're entitled to vote. I don't know. That's not only
20 a threshold issue, it's a key issue because if they are
21 entitled to vote and they vote against the plan, that's the end
22 of the case.

23 MR. FRANKEL: It would be the end of the plan.

24 THE COURT: The end of the plan. But before we get

1 to all that I think it's worthwhile to appoint a mediator and
2 see if a mediator can resolve these issues and maybe bring an
3 agreement among the parties. Now, the clients do have to
4 appear at the mediation. If it's more convenient, you know,
5 you can select someone upstate if that's a more convenient
6 location. I don't know. Undoubtedly more convenient for Mr.
7 Orseck's clients and I think you would want them at this
8 mediation. But I just mention that.

9 MR. ORSECK: Judge, the order though, in other words,
10 there is a --

11 THE COURT: The adequate protection order, you can
12 settle an order for the adequate protection order.

13 MR. ORSECK: And the \$1,500.00. You made findings.
14 I don't want to appear that I'm being pushy but it would appear
15 to me that you made --

16 THE COURT: But you see the reason I had that
17 question is when you came in here for adequate protection you
18 asked for a certain amount and you got it. It may be that if
19 they have to close and cure they have to pay that \$1,500.00 but
20 they don't have to cure a contractual default if that's what it
21 is and that's what it appears to be until they assume the
22 contract. I'm not going to tell them that they --

23 MR. ORSECK: Oh, yeah.

24 THE COURT: I'm not going to tell them they got to

1 pay a contractual cure cost as adequate protection.

2 MR. ORSECK: Oh no, no, no.

3 THE COURT: I have ruled --

4 MR. ORSECK: I didn't say that.

5 THE COURT: I have ruled -- if what you're asking is
6 have I ruled that they're obligated to pay \$1,500.00 a day for
7 every day they didn't close after November 29th and they
8 remained in possession less what they paid for use and
9 occupancy, yes, I've ruled that.

10 MR. ORSECK: Oh, that's --

11 THE COURT: But they don't have to pay that as
12 adequate protection. You made an application and you've gotten
13 what you've gotten.

14 MR. ORSECK: I understand.

15 THE COURT: All right.

16 MR. FRANKEL: Judge, you'll be issue the order or do
17 you want me to submit the order on mediation?

18 THE COURT: We'll issue the orders. We'll issue an
19 initial order today which will give you seven days to select a
20 mediator.

21 MR. FRANKEL: Thank you.

22 MR. ORSECK: It's still my obligation to settle the
23 other ones.

24 THE COURT: Yes. You should say it's your obligation

1 and it's your strong interest I would think to settle that
2 order which relates to adequate protection. I would do that
3 immediately.

4 MR. ORSECK: I will do that.

5 THE COURT: All right. Also, write a letter
6 withdrawing your --

7 MR. ORSECK: I will do that too.

8 THE COURT: -- the aspect of your motion which is the
9 motion to dismiss or convert without prejudice to your right to
10 raise the issues as opposition to confirmation.

11 With respect to your disclosure statement, you're
12 going to have to file a new disclosure statement in this case
13 anyway. You want to just withdraw that so I don't have to keep
14 having conferences on that? Do you have a status conference,
15 status conferences in this case?

16 MR. FRANKEL: No.

17 THE COURT: All right. Why don't you go next door?
18 Have you ever submitted a case management order in this case?

19 MR. FRANKEL: This case has been around for a couple
20 of years. I don't think so.

21 THE COURT: Well, it's not quite that old.

22 MR. FRANKEL: A year. No, we've never submitted a
23 case management --

24 THE COURT: All right. Why don't you get a date from

1 Ms. Parks about 30 days out --

2 MR. FRANKEL: Okay.

3 THE COURT: -- 45 days out and submit a case
4 management order just so we don't lose track of it. I will for
5 present purposes mark the disclosure statement off. The
6 evidentiary hearing has been dealt with. We've dealt with the
7 adequate protection issue. You can actually settle an order
8 fixing the amount of the claim as what I said, the \$1,500.00 a
9 day after November 29th less the monthly payments that they've
10 made for U&O plus the \$40,000.00 -- actually I take that back.
11 There's a dispute as to that, whether that 40 -- you can say
12 it's the \$40,450.00 without prejudice to the debtor's right to
13 show that it paid one of those payments. Okay? We'll deal
14 with it that way.

15 MR. FRANKEL: Judge, hadn't you also said that you
16 were reserving our rights on the issue of Judge Blackshear's
17 prior order fixing --

18 THE COURT: Oh yes, yes, yes, I take it back. I take
19 it back. I made those findings but then he raised the issue
20 that you were foreclosed from seeking those sums. In the
21 absence of the legal issue the order can say that without
22 prejudice to your right to contend that the debtor is
23 foreclosed from seeking these amounts based on Judge
24 Blackshear's prior rulings.

1 MR. FRANKEL: I think also there was the carrying
2 costs that we continue to incur subsequent to the --

3 THE COURT: I said you're entitled to a credit
4 against the \$1,500.00 daily --

5 MR. FRANKEL: Right.

6 THE COURT: -- expense because Mr. Lefkowitz --

7 MR. FRANKEL: Right.

8 THE COURT: -- testified it was either \$1,500.00 a
9 day or the carrying costs which he said were \$45,000.00 a month
10 although --

11 MR. FRANKEL: So we --

12 THE COURT: Let me finish. Although I looked at the
13 operating statements, they didn't appear to be that high. But
14 I don't think holdings is asking for nor is entitled to double
15 recovery.

16 MR. FRANKEL: Okay.

17 THE COURT: Why don't you settle an order which
18 includes these rulings and the reservations we've discussed?
19 Otherwise, we will just never remember this when the time
20 comes. We can hold off the briefing on the issue of whether or
21 not they're impaired although that may ultimately become a
22 question if it's not resolved by the mediator. Okay?

23 MR. FRANKEL: Okay.

24 MR. ORSECK: Judge, there's one matter that I need

1 some clarification. It's our position that when the \$20,500.00
2 check was not paid which was given in conjunction with the
3 September letter that the \$1,500.00 starts right away because
4 there was a breach and they were in possession for nothing.

5 THE COURT: You keep raising more issues, Mr. Orseck.
6 The question was -- certainly the agreement doesn't say that
7 you have a claim for the \$20,500.00. The letter agreement, I
8 don't know, did it terminate automatically? There was a
9 question of whether the agreement terminated I suppose.
10 Apparently the letter agreement is terminating automatically if
11 they fail to make those payments. I guess I understand your
12 argument that they had to close as of September 27th by not
13 paying for that extension. Why don't you reserve that as a
14 right that you can also argue? Okay? Is there anything else?

15 MR. FRANKEL: Yes, Judge. We may have a settlement.

16 MR. ORSECK: Judge --

17 THE COURT: You may have a settlement now.

18 MR. ORSECK: We may have a settlement.

19 THE COURT: Look, I have a judges' meeting. Can you
20 discuss this? I hate to keep you around. Discuss it and come
21 back at 2 or another time because I have to go. Why don't you
22 go out to lunch?

23 MR. FRANKEL: Yeah, okay. Fine.

24 THE COURT: Discuss it. We'll reconvene at 2:00.

1 Okay?

2 MR. FRANKEL: Okay.

3 [Off the record.]

4 THE COURT: Gentlemen.

5 MR. FRANKEL: Mark Frankel; Backenroth, Frankel and
6 Krinsky, attorneys for the debtor. Your Honor, I'm pleased to
7 report that we have a settlement of this case with the seller.
8 The debtor has agreed to close on, and the seller has agreed
9 to allow the debtor to close on the sale of the subject real
10 property at a total purchase price of \$1,725,000.00, so at
11 closing we will pay that amount less the \$140,000.00 that was
12 paid as a deposit. There will be a closing adjustment for
13 taxes that have been prepaid by the seller through the date of
14 closing. We anticipate doing this closing as soon as it's
15 practical in terms of real estate attorneys getting the title
16 reports and so forth. We would ask the Court to keep
17 jurisdiction over the case during that period and then we will
18 make a motion to dismiss as a structure dismissal.

19 THE COURT: In order to close though, that's a
20 transaction outside of the ordinary course of business. You're
21 in bankruptcy. How are you going to do it?

22 MR. FRANKEL: Well --

23 MR. ORSECK: Judge, before we do that, there's one
24 other item that we agreed on. Is this on the record?

1 THE COURT: Yes.

2 MR. ORSECK: Oh, okay. The transfer --

3 THE COURT: This is a settlement on the record.

4 MR. ORSECK: Yes.

5 THE COURT: This is binding.

6 MR. ORSECK: Yes, of course. The transfer taxes,
7 recording fees are all to be paid by the purchaser.

8 THE COURT: Why wouldn't you want to settle under a
9 plan and save those taxes?

10 MR. FRANKEL: They're nominal upstate.

11 THE COURT: Okay. All right. So is that in
12 satisfaction of all obligations and liabilities interstate?

13 MR. ORSECK: That is correct, Your Honor.

14 THE COURT: Is that correct?

15 MR. FRANKEL: Yes.

16 THE COURT: All right. So as I understand the
17 transaction, the debtor will pay \$1,725,000.00 less credit to
18 the \$140,000.00 but plus certain real estate obligations did
19 you say?

20 MR. ORSECK: The real estate taxes we paid in
21 advance, so they're adjustments.

22 THE COURT: Okay.

23 MR. ORSECK: In other words, the taxes that came due
24 January 1, 2005, assume we close in August, they'll have to

1 reimburse us for August, September, October, November,
2 December, five-twelfths. The school tax goes from September to
3 September, so they'd have to reimburse us one-twelfth of the
4 school tax. You understand that?

5 THE COURT: I mean but as of what point do they
6 become liable?

7 MR. ORSECK: It's an adjustment, an addition to the
8 purchase price.

9 THE COURT: I understand that but you've been paying
10 taxes for many years. At what point does the tax become their
11 liability that they have to pay for? Oh, you mean if you
12 prepaid --

13 MR. ORSECK: No, it's only an adjustment for the
14 current year.

15 THE COURT: I got you. Okay.

16 MR. ORSECK: All prior taxes have all been paid.

17 THE COURT: Right. Is that --

18 MR. FRANKEL: Yes.

19 THE COURT: -- agreeable to the debtor and is that
20 agreeable to the seller?

21 MR. ORSECK: Yes.

22 THE COURT: Okay. Then the matter is deemed settled.
23 I think you can do it one of two ways.

24 MR. FRANKEL: Okay.

1 THE COURT: If you want me to retain jurisdiction
2 then you should probably make a motion to assume the contract
3 or stipulate to assume the contract, include the resolution. I
4 deem it still settled. This is just a procedural issue.

5 MR. FRANKEL: Right.

6 THE COURT: Settle it on notice that you're going to
7 assume it and this is what the deal is. Then after it's
8 assumed I guess you can dismiss the case if that's what you
9 want to do.

10 MR. FRANKEL: Is there a second option you --

11 THE COURT: Well, you could do it, you know, you can
12 sell it under a confirmed plan.

13 MR. FRANKEL: Okay.

14 THE COURT: That's going to be longer and more
15 expensive. I don't see the reason to do that, frankly. Or you
16 could simply dismiss the case now and do it outside of
17 bankruptcy.

18 MR. ORSECK: Yeah, that was my suggestion but he
19 didn't want to do that.

20 MR. FRANKEL: I would like to do that except for the
21 fact that if there's a problem I don't want to have to start a
22 lawsuit in Sullivan County.

23 THE COURT: All right. So why don't you do this?
24 Why don't you settle a stipulation on ten days notice that

1 provides for the assumption of the sale contract under the
2 terms you've set forth and that's it. Then you can make a
3 separate motion or settle an order on the creditors dismissing
4 the bankruptcy if that's what you want to do. I don't want to
5 get involved though in determining fees or anything.

6 MR. ORSECK: I will do that tomorrow. I don't need
7 any ten days. I would sure appreciate if you'd shorten that
8 time because we're paying a premium mortgage interest rate, my
9 client, and every day the sooner we close, you know, we save
10 money.

11 THE COURT: Who else -- well, I don't think you have
12 to give notice to all creditors for a motion to assume. Let me
13 just --

14 MR. FRANKEL: There's only about six creditors. I
15 could send it out by Fed Ex.

16 THE COURT: He's more concerned about the ten day
17 period than the number of creditors.

18 MR. FRANKEL: We may be able to get their consent on
19 most of them. I don't know about the lawyers in the case who--
20 and other professionals but --

21 THE COURT: I would suggest you order this
22 afternoon's transcript in case there's any question about what
23 the settlement terms are.

24 MR. FRANKEL: Okay.

1 THE COURT: Try and come up with a stipulation within
2 the next two days and then order it if you can because as I
3 said, I consider it settled under these terms and what we're
4 really talking about is the mechanics now.

5 Okay. I don't see where you really necessarily have
6 to give notice to anybody else for the amount of time required.

7 I don't see -- is it one of the types of motions in 2002?

8 MR. FRANKEL: It's a 9019 motion. It would be --

9 THE COURT: Yes, but why don't we do this? Why don't
10 you submit your stipulation? Okay? You should probably settle
11 it on notice to the U.S. Trustee say on three days notice.

12 MR. FRANKEL: Okay.

13 THE COURT: It should provide that in the event that
14 there's no objection no hearing will be held or the Court may
15 not hold a hearing.

16 MR. FRANKEL: Okay.

17 MR. ORSECK: Judge, I'm not really looking for legal
18 advice but I really am.

19 THE COURT: Well, you're not going to get legal
20 advice.

21 MR. ORSECK: Okay. Is there any way for the Court to
22 retain jurisdiction on a dismissed case? If it is --

23 THE COURT: Well, I can dismiss it and then you can
24 reopen it if there's a dispute I suppose since he's made an

1 agreement in Bankruptcy Court.

2 MR. ORSECK: Why don't we do that?

3 THE COURT: I don't know if that gets you anywhere
4 any faster but you can do that.

5 MR. ORSECK: On the record, I would not oppose any
6 application even on one day's notice without an order to show
7 cause to reopen. I think it would be so much simpler and then
8 we can just start --

9 THE COURT: It's not necessarily simpler. Let me
10 tell you why.

11 MR. ORSECK: I'm sorry.

12 THE COURT: Nobody has gotten notice of the dismissal
13 motion and that's something people are entitled to and there
14 may be other creditors who come in and say these guys owe us
15 money, I don't want it dismissed.

16 MR. ORSECK: They were all here today.

17 THE COURT: Well, I don't know. They were here for a
18 different reason because they were subpoenaed. Why don't you
19 do your deal, this way you can do it within the context of the
20 bankruptcy. In the interim you could make the motion to
21 dismiss, but it's not such a big deal once you've concluded the
22 real estate transaction which is what this case is about
23 anyway.

24 MR. FRANKEL: So, settle a stipulation on three days

1 notice.

2 THE COURT: Yes, you might as well settle it on the
3 U.S. Trustee and the other six creditors and that's the deal.

4 MR. FRANKEL: And say that if there's an objection
5 that there may be a hearing.

6 THE COURT: Yes, the Court will schedule a hearing if
7 it deems one necessary.

8 MR. FRANKEL: Okay.

9 THE COURT: Okay. Thanks very much.

10 MR. ORSECK: Thank you.

11 MR. FRANKEL: Thank you for all your help, Judge.

12 THE COURT: Sure. By the way, Mr. Frankel, since I
13 won't have to decide it, I mentioned to you in chambers under
14 New York law the assignee of the contract doesn't get the tort
15 claims unless the assignment specifically says it. It's never
16 in the contemplation of the parties because they don't know
17 about the fraud when they take assignment.

18 MR. FRANKEL: My partner had been worrying about that
19 issue for quite some time.

20 THE COURT: Yes. I discovered it when I was doing
21 research on I think the equally questionable tax map
22 designation issue which with a little research I could have
23 ruled on from the bench, frankly.

24 MR. ORSECK: It was a fun case.

1 THE COURT: Okay. Well, have a good trip home.

2 MR. ORSECK: Okay, Judge.

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10 I certify that the foregoing is a court transcript from an
11 electronic sound recording of the proceedings in the above-
12 entitled matter.

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15 Mary Greco

16 Dated: July 26, 2005

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